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IN THE

Supreme Court of the United States

October Term, 1965

No. 352

J. LAURITZEN,

Petitioner,

—against—

ROBERT SPANN,

Respondent.

PETITION FOR REHEARING OF THE DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays for a rehearing of the denial of its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, which was entered in this Court on December 6, 1965.

REASONS FOR GRANTING THE PETITION FOR REHEARING

Statement

While the petition herein was most certainly denied, it nevertheless must have evoked sufficient interest within the Court to warrant requiring respondent to submit a brief in opposition, when this had been expressly waived. Yet, that brief served only to admit and point up the existing conflict (p. 2). Thus, perplexed by these events, but be-

lieving it had come close, petitioner is prompted to return to the Court with this substantial issue of maritime law, of sufficient gravity to motivate virtually the entire Merchant Marine of the United States to file a Brief Amicus.

Illustrative of the continuing confusion occasioned by this Court's not making a definitive decision in this area are the recent determinations appearing in the Appendix herein.

The within case squarely presents the issue which is (1) not yet decided by this Court (2) as to which admitted conflicts exist among the Courts of Appeals and (3) which it is the responsibility of this Court to resolve in the exercise of its rule-making role in maritime matters.

1. Issue not decided by this Court.

The issue of the responsibility of the shipowner, under the warranty of seaworthiness, for shore based equipment has never been passed upon by this Court. Indeed, the issue was specifically left open by *Roper* v. *United States,* 368 U. S. 20, 24 (1961)

> "This disposition of the case makes it unnecessary for us to pass upon the remaining question, i.e., whether a shore-based marine leg is within the warranty of seaworthiness in the circumstances here disclosed."

2. Acknowledged conflict among the Courts of Appeals.

That there is conflict among the Circuits on this important issue is evident from the decision of the Court of Appeals itself (p. 16a).

> "We agree with the Ninth Circuit in the *Huff* case that *McKnight* and *Forkin* are out of harmony with the principles announced by the Supreme Court."

The conflict is also acknowledged in respondent's Brief in Opposition (p. 2)

> "Admittedly the decision below is in conflict with the decisions of the Second and Sixth Circuits."

Conflicts with the *Spann* and *Huff* views, particularly as to the jurisdictional facet of the issue, also appear in decisions of the Fourth Circuit in *Hastings* v. *Mahon,* 340 F. 2d 910 (1965) and the Fifth Circuit in *Kent* v. *Shell Oil Company,* 286 F. 2d 746 (1961). With the exception of the First Circuit, this now represents an involvement of all the major maritime Circuits.

Conflicts among the Courts of Appeals, or even a "seeming conflict," in the maritime field have been consistently recognized by this Court as grounds for granting petitions for certiorari. Thus in *Boudoin* v. *Lykes Brothers,* 348 U. S. 336, 337 (1955), this Court mentioned a "seeming conflict"; in *Romero* v. *International Terminal,* 358 U. S. 354, 358 (1959) "because of the conflict among Courts of Appeals"; in *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 542 (1960) "to consider a question of maritime law upon which the Courts of Appeals have expressed differing views."; in *Guzman* v. *Pichirilo,* 369 U. S. 698, 699 (1962) "conflict * * * between the Courts of Appeals"; in *Italia Societa* v. *Oregon Stevedoring,* 376 U. S. 315, 318 (1964) "Because of a conflict between * * *".

The question whether the warranty of seaworthiness has applicability ashore is necessarily intertwined with that of maritime jurisdiction. On this issue this Court said of granting the petition in *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206, 209 (1963) "we brought the case here, * * * to resolve the apparently troublesome question as to the shipowner's liability for his torts which have impacts on shore." The question of how far maritime juris-

diction extended ashore was left open (p. 210) but it might be observed that the "far-fetched hypotheticals" noted are now beginning to take shape.*

Similarly in *Kossick* v. *United Fruit*, 365 U. S. 731, 733, (1961) this Court said "We brought the case here because it presented novel questions as to the interplay of state and maritime law", and in *The m/v Tungus* v. *Skovgaard*, 358 U. S. 588, 590 (1959) "Certiorari was granted primarily to consider the relationship of maritime and local law in cases of this kind."

3. By failing to speak out on this and other matters of maritime import, this Court is not fulfilling its traditional "rule fashioning" role.

a. *In General*

This Court has said that courts applying maritime law are "freer than common law courts in fashioning rules" *Halcyon Lines* v. *Haenn*, 342 U. S. 282, 285 (1951). They have "traditional discretion" in developing rules. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953). The courts referred to are, of course, Federal Courts, *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 361 (1959), whose ultimate voice and expositor is this Court. In *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*, 348 U. S. 310, 314 (1955), this Court acknowledged that it had "fashioned a large part of the existing rules that govern admiralty."

While this Court has reserved to itself this rule-making power, and to the exclusion of State law, see *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 409-410 (1953); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959), there has been a recent hesitance about exercising it in the field of maritime injury litigation. Thus, since the

*See *Daniel* v. *Skibs* A/S Hilda Knudsen—Appendix A1.

granting of the petition for certiorari in *Gillespie* v. *United States Steel Corp.*, 375 U. S. 962, January 6, 1964, not a single petition out of 45 filed[1] has been granted in the maritime injury-death field in the ensuing two years, with the exception of the recent decision in *Albanese* v. *N. V. Nederl. Amerik,* No. 523, December 13, 1965, which being summarily reversed in a short decision, settled little but its own outcome.

The language of Mr. Justice Brennan in his dissenting opinion in *United New York-New Jersey Sandy Hook Pilots Association* v. *Halecki,* 358 U. S. 613, 624 (1959), is equally applicable here where the denial of certiorari can give "no workable guide to the lower courts in this actively litigated field of federal law". His following language finds equal pertinence to the issues here and the proliferating conflicts in the Courts of Appeals, "And so confusion is left to breed further litigation in an already heavily litigated area of the law."

While the burdens of this Court spiral ever upward, and with this Term's reading matter more profuse[2] and possibly gamier than any found in maritime law, the Court should not lose sight of the fact that it is more than an interpreter of the Constitution, against a backdrop of legislative and decisional law fashioned by others. It has an historic and affirmative function of rule-maker in the field of maritime law. In such a role it might seem that proportionately more, not fewer, maritime matters would be accepted for review by this Court.

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[1] 1963-1964 Term—Nos. 577, 591, 634, 672, 683, 814, 815, 832, 842, 857, 859, 880, 956, 991
1964-1965 Term—Nos. 157 251, 341, 364, 398, 447, 468, 487, 529, 662, 707, 840, 846, 872, 911, 1017, 1020, 1056
1965-1966 Term—Nos. 78, 91, 299, 307, 344, 352, 399, 516, 523, 524, 542, 557, 654

[2] Nos. 42, 49 and 368

In the past two years, such important questions as (a) how far maritime jurisdiction extends ashore,[3] (b) the responsibility of the ship for shore-side equipment,[4] (c) the responsibility of shipowners for operating negligence of longshoremen,[5] have been left to languish unattended by this Court.

b. *In Particular*

Despite the acknowledged conflict, despite the fact that the *Gutierrez* case, 373 U. S. 206, 210, left open the question of how far inland the warranty of seaworthiness will move, despite the fact that the issue has been presented to this Court in ever increasing frequency, first in 1961 in *McKnight* v. *N. M. Paterson & Sons Ltd.*, 368 U. S. 913, and three times in 1965 in *Hastings* v. *Mahon* 380 U. S. 963, *Matson Navigation Company* v. *Huff*, 380 U. S. 943, and finally in the within litigation, despite the unsettled law in this general area, which has prompted one commentator to remark[6]

> "In the course of the years, both Congress and the Supreme Court have attempted to fix the land-based worker's rights. However, it is in this area when the vessel is in port that the Supreme Court has been most 'at sea'."

this Court, by consistently denying certiorari on these issues, has permitted the Courts of Appeals to interpret the maritime law in their separate ways, with a resultant breakdown in the uniformity desired. See e. g. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-

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[3] See 1954-1965 Term, Nos. 911 and 1017
1965-1966 Term, Nos. 91, 344, 352

[4] 1964-1965 Term, No. 846
1965-1966 Term, No. 352

[5] 1963-1964 Term, No. 991
1964-1965 Term, Nos. 398, 447, 529, 707

[6] *Baer-Admiralty Law of the Supreme Court 1963* Chap. 5 p. 70

246. (1942) The very increased incidence of petitions in this area should motivate the Court to seek a solution to the jurisdictional and substantive questions presented.

Certainly the importance of the issues transcends what might have been a reason for denying certiorari herein, namely the fact that there is not yet any judgment holding the shipowner finally liable. However, the Court of Appeals has finally determined the issue of law as to responsibility of the shipowner for the gear, and nothing more remains to be litigated on that point. Similarly, while the order for a new trial by the Court of Appeals in the recent decision of *Albanese* v. *N. V. Nederl. Amerika et al.,* No. 523—December 13, 1965, did not finally determine the issues therein, this Court not only granted the writ of certiorari, but summarily reversed.

The twin issues of maritime jurisdiction and ship responsibility for shore-side gear, have been here presented in simple form under a stipulated set of facts and are capable of a broad, settling decision. The Court should delay no longer in making the disposition that will inevitably have to be made.

CONCLUSION

FOR THE FOREGOING REASONS IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR REHEARING AND THE WRIT BE GRANTED.

December 30, 1965.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

New York, N. Y.,
December 30, 1965.

(s) J. WARD O'NEILL
Counsel for Petitioner

APPENDIX

1. *Daniel* v. *Skibs A/S Hilda Knudsen,* was tried in October of 1965 in the Eastern District of Pennsylvania, Civil No. 30778 before the Honorable Joseph S. Lord III and a jury. The quotes are from the charge which followed the *Spann* decision.

Daniel worked in a warehouse in Camden, New Jersey, "approximately half a block from where the ship was". He was "not transferring the bales of licorice from the hold of the ship to the flat car; he was not transferring the bales of licorice from the flat car to the warehouse. When Mr. Daniel entered the picture that had already been done. He was engaged in hooking-on with these tongs to the bales of licorice for the purpose of stacking them in the warehouse." An "engine . . . pulled the flat cars down to the warehouse." While stacking the bales in the warehouse a piece of rope attached to the tongs broke. Plaintiff claimed that he was owed the warranty of seaworthiness by reason of the condition of the rope in the warehouse.

The District Court, following *Spann,* left it to the jury to decide whether or not plaintiff "was actually engaged in unloading the vessel at the time of his injury, whether or not the work that he was doing was an essential part of the actual unloading of the vessel."

If the answer to that question was yes, then the Court held that whatever was used therein, i.e., the rope in the warehouse "is an appurtenance of the ship because it is used in connection with the loading, if you so find." The jury found for the plaintiff on October 19, 1965.

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2. In contrary District Court decision, in the Eastern District of Louisiana, Baton Rouge Division, CA3069,

Appendix

Dugas v. *N. Y. K. Line,* a longshoreman working on the ship was struck by a dockside crane during the course of the operation. On November 4, 1965, the Honorable E. Gordon West directed a verdict, stating in an oral opinion from the bench that no warranty of seaworthiness was owed to the injured longshoreman since the crane was not attached to the vessel. No written opinion was handed down.